

The Case of Reality v. Ideology

Assessment by Fact or Hearsay?

This year's Board of Assessors has submitted a budget projection that would, if approved, make funds available to future Boards to obtain legal opinions and other professional guidance in fulfilling their obligation to assess the full rental value of leased lands in Arden. Issues such as multiple domiciles, factors and personal property taxes, which might be resolved or clarified by legal opinion, have been already been discussed at Board meetings this year. The minutes may be reviewed at www.theardens.com/arden/assessors.htm

Each year, the Board of Assessors sets the "full rental value" of Arden leaseholds. But, here's the catch: there is no definition for the term "full rental value" in Arden's controlling legal documents (the Deed of Trust, the Act to Reincorporate and the Arden Leases). There's no formula provided, no requirement that the Assessors know the ideology or legal basis for previous assessments, and, there's no limitation on how much the rate can go up or down from one year to the next. Each new Board of Assessors starts from scratch. We have some well-written and well-reasoned essays by previous Assessors that advance one or more contemporary methods for assessment which help us to understand what's been done for the past quarter century. But none of this is law.

In order to arrive at an assessment rate, one must first embrace a new philosophy or acknowledge the merits of a previously accepted philosophy. I believe that the reality of today's real estate market and the cost of maintaining our Community Standard of Living do not easily dovetail with the ideology of the founders of this community. Fundamental and serious questions continue to surface as to where we stand, legally, on matters of land rent assessment. Is it reasonable to rely solely on what we hear around town? As an Assessor, I'd be more comfortable relying on sound legal advice.

The case of *Ross v. Freeman* (Delaware Court of Chancery, 1935), for example, demonstrates how a flawed legal opinion obtained by the Trustees in 1924 resulted in the use of inappropriate assessment procedures for nine years, and, ultimately, in the Trustees filing a lawsuit against a group of residents. The Trustees were advised by their counsel that assessment of land rent was a primary duty of the Trustees and could not be delegated. The Town was informed by the Trustees that the Assessors' work would be viewed as a recommendation only. Other details of the case aside, the root of the problem was that the Trustees acted on what we now know was flawed legal advice in the absence of a separate legal opinion which should have been obtained by the Board of Assessors. This is not an isolated incident.

Just last fall, one of the Trustees interfered in town business relating to a referendum. While I sincerely appreciate the dedication and hard work of our Trustees and accept that this misstep was innocent, I believe this episode clearly demonstrates the need for separate and independent legal counsel. In

this matter, the Town Assembly Chair contacted the town's attorney for an opinion concerning the possible outcome of the referendum on assessment rates. A legal opinion was received and reported at the September Town Assembly. One of the Trustees disagreed with that opinion and contacted the attorney, who also happens to represent the Trustees. The result was a reversal of the original opinion. Clearly, this was a matter of town business, NOT a Trustees' matter. I believe the action by the Trustee in this case was inappropriate. Unfortunately, a precedent was set in that a legal opinion was obtained under questionable circumstances, and, to my knowledge, it remains unchallenged.

Today, as was the case eighty years ago, some still believe the Assessors must take legal questions to the "town's attorney," the same attorney who represents the Trustees and the Village. But, what happens if the position of the Board runs counter to the position of the Trustees' or Advisory Board? How can one attorney represent both sides of the same issue? Even if that were possible, what guarantee would either side have of fairness and impartiality? Would the client with a longer-term relationship have an advantage in framing the issues? The list of legal and ethical challenges in such a situation is endless and unnecessary.

To date, there is not one legal opinion, and few professional opinions of any kind, obtained by the Board of Assessors to provide a sound and independent basis for its decisions, despite its weighty responsibility of fairly determining every resident's land rent. This year's Board cannot change that, but it can and does recognize the problem. With a reasonable budget, future Boards of Assessors can begin to build a much-needed

factual, and legally defensible, knowledge base on the issues surrounding land rent assessment. The primary challenge facing this community as it enters its second century is determining the proper level and method of taxation. By providing a realistic budget, we enable future Boards to meet that challenge.

Denis O'Regan

Chair, Board of Assessors